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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Glenn)

THE PEOPLE, Plaintiff and Respondent, v. EMANUEL MONTALVO MERCADO, Defendant and Appellant.	C079671 (Super. Ct. Nos. 11NCR09001, 12NCR09089, 12NCR09093, 12NCR09489)

Defendant Emanuel Montalvo Mercado appeals from the trial court's orders denying his petitions for reduction of his felony convictions to misdemeanors pursuant to Penal Code[1] section 1170.18, subdivision (f) in four separate cases.[2] He contends the

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1 Further section references are to the Penal Code unless otherwise indicated.

2 Defendant's notice of appeal purports to appeal the trial court's custody credit calculation and does not mention the trial court's denial of his petitions for resentencing. Because defendant's notice of appeal is timely as to the issues raised and we have an

trial court erred in finding these felony convictions were ineligible for reduction under Proposition 47. We agree but only regarding defendant's conviction for unlawful taking and driving a vehicle. We disagree regarding defendant's conviction for receiving a stolen vehicle and convictions for transportation of a controlled substance. Accordingly, we affirm without prejudice to consideration of a petition providing evidence of defendant's eligibility in case No. 12NCR09093. We affirm in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

In January 2012, defendant pled no contest to one count of transportation of methamphetamine pursuant to the statute then in effect, which did not require defendant transport the methamphetamine for sale as the current statute does. (See *People v. Eagle* (2016) 246 Cal.App.4th 275, 278.) The minute order from defendant's plea hearing provides the parties stipulated defendant possessed the methamphetamine for personal use.

In February 2012, defendant was charged with two offenses related to the taking and driving of a 1998 Honda Civic. Before resolving this case and while out on bail, defendant was again arrested and charged with two offenses and an on-bail enhancement related to the taking and driving of a 1992 Honda Civic. He resolved these cases at the same time by pleading no contest to receiving the stolen 1998 Honda Civic (§ 496d, subd. (a)), and unlawfully taking and driving the 1992 Honda Civic (Veh. Code, § 10851) while released on bail (§ 12022.1).

In December 2012, defendant again pled no contest to one count of transportation of methamphetamine pursuant to the statute then in effect, which did not require he

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adequate record and briefing, we will exercise our discretion to reach the merits of defendant's claim. (See *People v. Jones* (1995) 10 Cal.4th 1102, 1106-1108, disapproved on other grounds in *In re Chavez* (2003) 30 Cal.4th 643, 656.) Defendant does not argue in his brief on appeal that the trial court erred in calculating his custody credits.

transport the methamphetamine for sale. (See *People v. Eagle, supra,* 246 Cal.App.4th at p. 278.)

Defendant petitioned for reduction of his felony drug offenses to misdemeanors. The prosecution opposed defendant's petitions and also opposed reduction of the theft offenses in defendant's outstanding cases. The court found all of these convictions were ineligible for resentencing under section 1170.18 and thus it could not reduce any of them to misdemeanors. Defendant appeals.

DISCUSSION[3]

"In November 2014, the voters passed Proposition 47, The Safe Neighborhoods and Schools Act, which reduced certain drug- and theft-related offenses from felonies or 'wobblers' to misdemeanors. Proposition 47 reclassified some offenses by amending the statutes that defined those crimes. As relevant here, Proposition 47 amended [Health and Safety Code] section 11377 to punish as a misdemeanor the possession of a controlled substance. (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 13, p. 73 (Voter Information Guide).) In other instances, Proposition 47 added new provisions to the Penal Code carving out a lesser crime from a preexisting felony (see Voter Information Guide, *supra,* § 5, p. 71 [creating Pen. Code, § 459.5 to distinguish the misdemeanor of 'shoplifting' from the felony of burglary]) or redefining how a term is understood throughout the California Codes (see *id.,* § 8, p. 72 [adding Pen. Code, § 490.2 to lower the potential punishment for certain categories of grand theft '[n]otwithstanding . . . any other provision of law defining grand theft' (italics omitted)]). Through its various provisions, Proposition 47 made clear that certain types of criminal conduct once punishable as felonies now constitute only misdemeanors." (*People v. Martinez* (2018) 4 Cal.5th 647, 651.)

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3 This matter was assigned to the panel as presently constituted in January 2019.

The initiative also provided that "[a] person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors." (§ 1170.18, subd. (f).)

"A defendant seeking resentencing under section 1170.18 bears the burden of establishing his or her eligibility, including by providing in the petition a statement of personally known facts necessary to eligibility." (*People v. Page* (2017) 3 Cal.5th1175, 1188.) If the defendant fails to meet this burden, the trial court's order denying the petition must be affirmed, even if the trial court expressed a different reason for denying the petition. (*People v. Perkins* (2016) 244 Cal.App.4th 129, 139.) "[O]n appeal we are concerned with the correctness of the superior court's determination, not the correctness of its reasoning. [Citation.] ' "[W]e may affirm a trial court judgment on any [correct] basis presented by the record whether or not relied upon by the trial court." ' " (*Ibid*.)

I

Car Offenses

Defendant contends the trial court erred when it found his felony convictions for unlawful taking or driving a vehicle and receiving a stolen vehicle ineligible for reduction. We agree but only to defendant's conviction for unlawful taking or driving a vehicle.

In *Page*, the California Supreme Court determined that "Proposition 47 makes some, though not all, [Vehicle Code] section 10851 defendants eligible for resentencing." (*People v. Page, supra,* 3 Cal.5th at p. 1184.) Specifically, the court held that a Vehicle Code section 10851 conviction may be resentenced to a misdemeanor "if the vehicle was worth $950 or less and the sentence was imposed for theft of the vehicle." (*Page*, at p. 1187; see *id.* at pp. 1184-1185 [similar eligibility criterion for resentencing and for

redesignation after the sentence has been completed].) The court observed that "while Vehicle Code section 10851 does not expressly designate the offense as theft, the conduct it criminalizes includes theft of a vehicle . . . . And to the extent vehicle theft is punished as a felony under [Vehicle Code] section 10851, it is, in effect, a form of grand, rather than petty, theft." (*Page*, at p. 1186.)

To establish eligibility for reduction of a Vehicle Code section 10851 conviction, the defendant must show (1) the conviction was based on theft of the vehicle, rather than on posttheft driving or on a taking without the intent to permanently deprive the owner of possession, and (2) the vehicle was worth $950 or less. (*People v. Page*, *supra*, 3 Cal.5th at p. 1188.) In *Page*, the court found the defendant's petition was properly denied where it contained "no allegations, testimony, or record references to show either that his Vehicle Code section 10851 conviction rested on theft of the vehicle or that the vehicle's value was $950 or less." (*Page*, at pp. 1180, 1189.) The court determined, however, the defendant was "entitled to an opportunity to file a new petition" because "the proper allocation of the burden of proof and the facts necessary to resentencing on a Vehicle Code section 10851 conviction were not set out expressly in the text of Proposition 47, and . . . neither had yet been judicially articulated when defendant submitted his petition." (*Page*, at p. 1189.) The court concluded that the trial court's order denying the defendant's petition should be "affirmed without prejudice to consideration of a petition providing evidence of his eligibility." (*Id*. at p. 1190.)

Here, like *Page*, defendant's petition contained no allegations, testimony, or record references showing (1) his Vehicle Code section 10851 conviction was based on the theft of the 1992 Honda Civic as opposed to the driving of it, and (2) the 1992 Honda Civic's value was $950 or less. Instead, the prosecution construed defendant's petitions as requesting reduction of his felony convictions in all his outstanding cases and opposed the reduction of defendant's Vehicle Code section 10851 conviction as ineligible. Therefore, the court properly denied defendant's petition. (*People v. Page*, *supra*, 3

Cal.5th at p. 1189.) But because defendant's petition was filed before "the proper allocation of the burden of proof and the facts necessary to resentencing on a Vehicle Code section 10851 conviction" were clearly established, defendant is "entitled to an opportunity to file a new petition" to "allege and, where possible, provide evidence of the facts necessary to eligibility for resentencing under section 1170.18."[4] (*Page*, at p. 1189.)

Defendant's conviction for receiving a stolen vehicle, however, is ineligible for reduction. Section 496d is not among the statutes listed in section 1170.18 and there is "no indication that the drafters of Proposition 47 intended to include section 496d." (*People v. Varner* (2016) 3 Cal.App.5th 360, 366.) In *Varner*, "[t]he court distinguished 'the changes made by Proposition 47 to the crimes of grand theft and petty theft,' which were accomplished in part by the addition of section 490.2, which defines petty theft and references ' "any other provision of law defining grand theft." ' [Citation.] The court noted that no such broad language had been included in the changes made to section 496, subdivision (a) [(receipt of stolen property)], and that section 496, subdivision (a) 'contains no reference to section 496d.' [Citation.] This indicated that 'the drafters [of Proposition 47] intended section 496d to remain intact and intended for the prosecution to retain its discretion to charge section 496d offenses as felonies.' [Citation.] The court also rejected the notion that section 490.2 applied to receiving stolen property offenses,

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[4] Defendant contends he is entitled to vacatur of the on-bail enhancement (§ 12022.1) attached to this conviction once it has been reduced to a misdemeanor. While that may be the case (see § 1170.18, subd. (k)), defendant must first have his felony reduced. We leave that determination and the resulting effect on the on-bail enhancement to the trial court.

finding that if so, there would have been 'no need to amend section 496.' " (*People v. Orozco* (2018) 24 Cal.App.5th 667, 674.)[5]

We agree with *Varner*. We recognize, however, that the First District recently came to a different conclusion and held that Proposition 47 affords relief to criminal defendants convicted of receiving a stolen vehicle. (*People v. Williams* (2018) 23 Cal.App.5th 641, 651.) In *Williams*, at page 650, the court found section 496d analogous to section 484e, which the California Supreme Court determined in *Romanowski* was a theft crime within the purview of Proposition 47 vis-à-vis section 490.2. (*People v. Romanowski* (2017) 2 Cal.5th 903, 907-909.) We have considered and, for the reasons stated, rejected defendant's argument regarding the reach of section 490.2. Respectfully, nothing in *Williams* persuades us otherwise, as we do not agree that the theft-related crime of receiving stolen property is analogous to the crime of theft of access card account information. (*Williams*, at p. 650; see *Romanowski*, at p. 912 ["Theft of access card information requires 'acquir[ing] or retain[ing] possession of access card account information with respect to an access card validly issued to another person, *without the cardholder's or issuer's consent*.' [Citation.] This 'without . . . consent' requirement confirms that theft of access card information is a 'theft' crime in the way the Penal Code defines 'theft' "].)

We observe that *Williams* did not address the *Varner* decision beyond a citation relating to dismissal of the matter on review following the decision in *Romanowski*. (*People v. Williams*, *supra*, at p. 648, fn. 4.)[6] Indeed, the California Supreme Court granted review of *Varner* and ordered further action deferred pending its decision in *Romanowski*. After the *Romanowski* opinion was filed, our Supreme Court dismissed

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[5] Our Supreme Court granted review of *Orozco* but denied the request for an order directing depublication. (Review granted Aug. 15, 2018, S249495.)

[6] No petition for review was filed in *Williams*.

review in *Varner*, leaving the case published. (See Cal. Rules of Court, rule 8.1115(e).) "Absent further guidance from the Supreme Court, we are hesitant given our role as an intermediate appellate court to take [the] expansive view [urged by defendant]." (*People v. Soto* (2018) 23 Cal.App.5th 813, 824 [concluding theft from an elder, while a theft-related crime, was not eligible for Proposition 47 reduction].)

II

Drug Offenses

Defendant contends his convictions for transportation of methamphetamine are eligible for Proposition 47 reduction. We disagree.

In 2012, when defendant was convicted of transportation of methamphetamine, section 11379, subdivision (a) provided that any person who "transports" specified controlled substances including methamphetamine shall be punished by imprisonment. (§ 11379; Stats. 2011, ch. 15, § 174.) "The courts had interpreted the word 'transports' to include transporting controlled substances for personal use. [Citations.] Effective January 1, 2014, . . . the Legislature amended section 11379 to define 'transports' as meaning to transport for sale." (*People v. Eagle*, *supra*, 246 Cal.App.4th at p. 278.) "In light of this amendment to section 11379, the possession and movement of methamphetamine for personal use, without intent to sell, can be charged only as a possession offense under section 11377." (*People v. Martinez*, *supra*, 4 Cal.5th at p. 651.)

Defendant contends, under the amendment to Health and Safety Code section 11379 that defines transport as meaning transport for sale, his transportation convictions would have been punishable only as misdemeanors under Health and Safety Code section 11377 because they did not involve the intent to sell. Therefore, since his possessions of methamphetamine would have been misdemeanors if Proposition 47 had been in effect when he committed these offenses, the court erred when it found the

convictions ineligible for reduction to misdemeanor violations of Health and Safety Code section 11377, subdivision (a).

Martinez disposes of defendant's contention. In *Martinez*, pursuant to section 1170.18, subdivision (a), the defendant filed a petition for resentencing on two 2007 felony convictions, including one for transportation of methamphetamine. The trial court, however, denied the petition as to the transportation conviction, "observing that Proposition 47 did not expressly reduce the transportation offense to a misdemeanor." (*People v. Martinez*, *supra*, 4 Cal.5th at p. 649.)

On appeal, the defendant argued, based on the 2013 amendment to section 11379, that "the evidence that he possessed and transported methamphetamine, without proof that he transported it for sale, meant that he 'would have been guilty of a misdemeanor under [Proposition 47] had [Proposition 47] been in effect at the time of the offense . . . .' " (*People v. Martinez*, *supra*, 4 Cal.5th at p. 653.) In rejecting this argument, our Supreme Court held, "Because Proposition 47 did not reduce the transportation of a controlled substance from a felony to a misdemeanor, Martinez is ineligible for resentencing on that offense." (*Martinez*, at p. 653.)

The defendant in *Martinez* also argued that the 2013 amendment to Health and Safety Code section 11379 "implicitly broadened the scope of [Health and Safety Code] section 11377 and that his transportation conviction, obtained without proof of intent to sell, should now be construed as falling under [Health and Safety Code] section 11377 and thus reducible to a misdemeanor." (*People v. Martinez*, *supra*, 4 Cal.5th at p. 655.) In rejecting this argument, however, the court held the amendment to Health and Safety Code section 11379 was not retroactive to cases that were final. (*Martinez*, at p. 655.)

Defendant's convictions also became final before the amendment to Health and Safety Code section 11379 took effect, meaning the amendment did not apply to him. Thus, based on our Supreme Court's decision in *Martinez*, we conclude defendant's felony convictions for transportation of methamphetamine are ineligible for reduction.

DISPOSITION

We affirm the court's order in case No. 12NCR09093 without prejudice to consideration of a petition providing evidence of defendant's eligibility for reduction of his felony conviction for unlawful taking or driving of a vehicle to a misdemeanor pursuant to section 1170.18. The court's orders in cases Nos. 11NCR09001, 12NCR09089, and 12NCR09489 are affirmed.

/s/
Robie, J.

We concur:

/s/
Raye, P. J.

/s/
Renner, J.